No. 8408

# In the

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# United States

## Circuit Court of Appeals

### For the Ninth Circuit

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C. E. HULL, Receiver of The Nogales National Bank of Nogales, Arizona, a national banking association,

Appellant,

vs.

SANTA CRUZ COUNTY, a body politic and corporate,

Appellee.

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# Brief of Appellee

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**Upon Appeal from the District Court of the United States for the District of Arizona**

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# Brief of Appellee

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### STATEMENT OF THE CASE

While appellant's statement of the case is correct, we believe that the following brief statement recites all facts necessary for a consideration of the question involved.

The Nogales National Bank was appointed a depositary for Santa Cruz County, Arizona, and between

June 3, 1925, and May 7, 1928, the Treasurer of said County deposited with said bank $50,000 of the public moneys of said County. On the following dates the bank pledged to the County the following bonds as security for payment of the amount deposited and interest March 14, 1928, $15,000 bonds of Pima County School District No. 1 and $5,000 bonds of Salt River Valley Water Users' Association; June 28, 1928, $21,000 City of Nogales Waterworks Improvement bonds and $9,000 City of Nogales Sewage Disposal bonds; April 10, 1921, $7,000 bonds of Salt River Valley Water Users' Association. All of the pledged bonds were delivered to The National City Bank of New York as escrow holder.

The Nogales National Bank was closed on December 1, 1931, and on December 16, 1931, the bank was declared insolvent and a Receiver was appointed by the Comptroller of the Currency. At the time of closing $50,000 plus $166.66 interest was owing to the County upon its deposit. All of the bonds in its possession were delivered to the County Treasurer by the escrow holder on April 4, 1932, after the closing of the bank.

The $5,000 bonds of Salt River Valley Water Users' Association, pledged on March 14, 1928, were redelivered to the bank prior to closing. Since the bank closed the $15,000 bonds of Pima County School District No. 1 were sold by the County Treasurer and $2,000 of the Salt River Valley Water Users' Associa-

tion bonds which were pledged on April 10, 1931, have been paid to the County Treasurer. Since the closing of the bank $44,198.41 has been received by the County Treasurer from the following sources:

| | |
|---|---|
| Dividends paid by the Receiver | $22,575.00 |
| Sale of Pima County School District No. 1 bonds | 14,257.16 |
| Salt River Valley Water Users' Association bonds paid | 2,000.00 |
| Coupons of various bonds paid | 5,366.25 |
| Total | $44,198.41 |

The County brought this suit against the Receiver of The Nogales National Bank to foreclose its pledge lien upon the bonds remaining in the possession of the County Treasurer, to-wit, $21,000 City of Nogales Waterworks Improvement Bonds, $9,000 City of Nogales Sewage Disposal Bonds, and $5,000 bonds of Salt River Valley Water Users' Association. The Receiver filed his counterclaim to recover the bonds remaining in the possession of the Treasurer and the proceeds from the bonds and coupons which have been paid or sold. A decree was rendered by the United States District Court foreclosing the County's pledge lien in satisfaction of the amount owing on the deposit, to-wit, $5,968.25, and denying the counterclaim of the Receiver. From this decree the Receiver has appealed.

## QUESTION INVOLVED

The sole question involved concerns the validity of the pledge after June 25, 1930, the effective date of the Act of Congress which enables national banks to give security for deposits of public moneys. (Title 12, Sec. 90, U. S. C. A. as amended June 25, 1930, c. 604, 46 Stat.) It will of course be remembered that the bank did not close until December 1, 1931, seventeen months after this amendment became effective.

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## ARGUMENT

Section 2634 of the Revised Code of 1928 of Arizona, which relates to the deposit of public moneys and which has been in effect during all of the transactions above mentioned, provides:

> "Any bank, before receiving such deposit, shall execute and deliver a bond, issued by a surety company approved by the treasury department of the United States and authorized to do business in this state, approved as to form by the legal adviser of the designating officers, and shall be in a penalty of not less than the amount the said bank may receive on deposit, or said bank may deposit with the . . . county treasurer . . . in lieu of a surety bond, regularly issued and interest bearing bonds of the following character: United States government bonds, state, county, municipal and school district improvement bonds, bonds of federal land banks, bonds of joint stock

land banks, bonds issued or guaranteed by corporations operating a United States reclamation project within the state when issued or guaranteed with the approval of the secretary of the interior, registered warrants of this state and registered county warrants when offered as security for moneys of the county by which they are issued. . . . The conditions of such bond, or the deposit of securities in lieu thereof, shall be that such bank will promptly pay to the parties entitled thereto, public moneys in its hands, upon lawful demand therefor, and will, whenever thereunto required by law, pay to the treasurer making the deposit, such moneys, with interest thereon as hereinafter provided."

The Act of Congress which became effective on June 25, 1930, (Title 12, Sec. 90, U. S. C. A. as amended June 25, 1930, c. 604, 46 Stat.) provides:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such banking association is located in the case of other banking institutions in the State."

The trial court, following the cases cited in its memorandum opinion, (Transcript of Record, page 48) found and held that the pledge was intended as a continuing one to run until the repayment of the deposit and extended until the closing of the bank; that when

the lack of power of the bank to pledge the bonds was removed by the above amendment the original agreement could as to the future have full effect; that upon the passage of the amendment The Nogales National Bank was empowered to pledge its security and to ratify an executory or continuing pledge, previously beyond its power, and that it was not necessary to go through the formality of executing a new pledge.

Lewis vs. Fidelity & Deposit Co. of Maryland, 54 S. Ct. 848, 292 U. S. 559, 78 L. Ed. 1425, is the last word of the Supreme Court upon the question. The Court held that a pledge which was made prior to the amendment became effective upon the passage of the amendment and that it was not necessary that the bank give a new bond or security after June 25, 1930. The Court states:

> "The receiver contends that, even if national banks are authorized under the 1930 act to give a general lien upon their assets of the character described by the Circuit Court of Appeals, the judgment should be reversed because the bond antedated the act. It appears that the balance on hand June 25, 1930, was withdrawn soon thereafter; that between June 25, 1930, and the appointment of the receiver, May 23, 1932, deposits were regularly made aggregating a large sum; that from time to time checks were drawn against these deposits; and that all of the balance in bank when the receiver was appointed represented deposits made after the passage of the act. The appointment of the bank as depository in 1928 and

the bond were to cover a period of four years. Though the lien was in form security for the bond, the extent of liability was to be measured by the unpaid balance. Thus, the transaction was not completed in 1928; it was contemplated that there would be continuous dealings between the parties for four years. In fact, the relation continued until the appointment of the receiver. Throughout the whole period the parties intended that the lien should be operative and supposed that it was. The appointment was within the power of the state to confer and of the bank to accept, but, by reason of the paramount federal law, one of the anticipated incidents of the relation, the lien, could not arise. When that obstacle was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties; and the lien became operative as to deposits thereafter made and is entitled to priority from the date of the act. A statute is not retroactive merely because it draws upon antecedent facts for its operation. Compare Cox v. Hart, 260 U. S. 427, 435, 43 S. Ct. 154, 67 L. Ed. 332; Ewell v. Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. Ed. 682; Petterson v. Berry (C. C. A.), 125 F. 902; Hartford Fire Insurance Co. v. Chicago, M. & St. P. Ry. Co. (C. C.), 62 F. 904, 910; Rosenplanter v. Provident Savings, etc., Soc. (C. C. A.), 96 F. 721, 46 L. R. A. 473. It was not necessary to go through the form of executing a new bond. Compare Jones v. New York Guaranty & Indemnity Co., 101 U. S. 622, 627, 25 L. Ed. 1030."

In Kavanaugh vs. Fash (C. C. A. 10), 74 F. (2d) 435, the Court held that the statute is not procedural in nature and does not provide the manner in which the indemnity shall be effected, and that the enabling act vitalized a previously made pledge with respect to money deposited after it became effective.

In Ross vs. Knot, (District Court, N. D. Fla.) 13 F. Supp. 963, both the deposit and the pledge of bonds were made prior to June 25, 1930, the effective date of the amendment. We quote as follows from the opinion:

> "In the case at bar, the Florida Laws permitted the pledging of securities by banks and a continuing agreement was entered into by the treasurer with the First National Bank of Perry, which agreement was that the treasurer would deposit money, and would recognize that bank as a public depository. These securities were pledged for the safekeeping and prompt payment by the bank of these deposits. Thus far, the only distinction between the Lewis Case and the instant case is that there a general lien was provided upon the giving of bond, while in the case at bar a specific lien was contemplated upon the securities pledged with the state treasurer. After the adoption of the amendment of June 25, 1930, it is true that no deposits were made by the state treasurer in the instant case, but there was a balance on deposit which remained due and unpaid until the bank closed its doors in the latter part of October, 1930. It is true, according to the allegations of the bill, that the state treasurer made no further de-

posits and that he did not call on the bank to repledge its securities, but that he contented himself with the security pledged prior to the amendment; but it is likewise true that the legislatively established public policy of the state of Florida required security to be taken for such deposits, and after June 25, 1930, national banks were authorized to give it. Moreover, on June 25, 1930, and thereafter, such security was held under the pledge agreements set up in the bill.

"Deposits in a bank create but one liability, that of debtor and creditor; and to say that the pledging of the security before the amendment was null and void and inoperative to protect a balance in the hands of the bank after the obstacle, which prevented an effective original pledge, was removed and the original agreement could be given the effect intended, would in the instant case be to allow the bank to continue to hold unpaid balances, having theretofore delivered security, at a time when the state law in effect required, and the federal law authorized, security to be given. To say that the original agreement of the parties may be given the effect intended as to deposits made after June 25, 1930, but not as to unpaid balances remaining on deposit after that date is to sacrifice equitable principles upon the altar of tenuous distinctions. In each situation the relation of the bank and the depositor is the same, that of debtor and creditor. It is hardly to be presumed that, in order to make the unpaid balance a deposit for which the security would be liable, it would be necessary for the treasurer to have appeared at the

bank window, give his check for the unpaid balance; and, the next moment, deposit it."

The District Court is undoubtedly correct in its opinion, especially in view of the Supreme Court's statement that a repledging of the securities is unnecessary. Lewis vs. Fidelity & Deposit Co. of Maryland, supra. There are really two separate transactions when security is given, the deposit and the pledge; and the pledge is the only feature that is being attacked in this case. The debtor-creditor relationship which results from the deposit is not affected by the fact that a pledge is or is not given as security. Neither would this relationship be changed or affected by withdrawing the funds on June 26, 1930 and immediately redepositing them. The same with the pledge; handing the pledged bonds to an officer of the bank with immediate return thereof to the pledgee is unnecessary and the Supreme Court has so stated. The validity of the pledge is not affected by the fact that the deposit may have been made prior to June 25, 1930 for the reason the bank was authorized to accept deposits both before and after that date. The debt which resulted from the deposit was valid and enforceable both before and after the passage of the amendment. The conduct of the parties shows an intention to continue the pledge after the amendment became effective and the trial court so found. A pledge may be given to secure a pre-existing indebtedness. 49 C. J. page 906, Sec. 28. The indebtedness upon the deposit was en-

forceable at all times, and the pledge became valid and effective from and after June 25, 1930.

In Haynes v. City of Woodward, (District Court, N. D. Okla.), 6 F. Supp. 270, the court states:

> "It is true that originally the bonds were given by the bank to the treasurer of the City of Woodward to secure the deposit prior to June 25, 1930, the date on which the federal law was enacted. However, the Woodward bonds amounting to $28,000 were continued in the possession of the treasurer of the City of Woodward, after the enactment of the law herein set out of June 25, 1930, and, by the acts and conduct of both the city treasurer and of the bank subsequent to June 25, 1930, were treated as a pledge to the city to secure said deposit. The government bonds in the sum of $100,000 were pledged on March 26, 1930. On December 3, 1930, however, these bonds were surrendered, and there was substituted therefor United States Treasury bonds of the par value of $101,950. This act was approved by the officers of the bank. On June 10, 1931, the $101,950 of Treasury bonds were surrendered pursuant to the instructions of the First National Bank of Woodward and there was reissued to the treasurer $91,950 in bonds on a joint custody receipt signed by the First National Bank of Woodward; $10,000 of these bonds were surrendered to the bank.
>
> "However, the conduct of the bank at all times subsequent to June 25, 1930, approving the pledge to the city of Woodward, in the judgment of the court, would have the same effect as if said entire

pledge had been made subsequent to June 25, 1930."

And in Haynes v. United States Fidelity & Guaranty Co. (District Court, W. D. Okla.) 6 F. Supp. 272, it was held that the court should look to the substance of the transaction rather than its form.

Section 2634 of the 1928 Revised Code of Arizona and its predecessor statutes have been in effect since September 1, 1901, since which time security for deposits of public money has been required. (Section 3771, Revised Statutes of Arizona, 1901, amended by Chapter 96, Session Laws of Arizona, 1909, codified under Section 4643, Revised Statutes of Arizona, 1913, Civil Code, amended by Chapter 45, Session Laws of Arizona, 1923, amended by Chapter 71, Session Laws of Arizona, 1927, and codified in 1928 under Section 2634.) Therefore, for the past thirty-five years the public policy of the State with respect to securing deposits of public funds has been firmly established. This Circuit of Appeals has stated in Capital Savings and Loan Ass'n., et al., v. Olympia Nat. Bank, et al., 80 F. (2d) 561:

"In Texas & P. Ry. Co. v. Pottorff (C. C. A. 5) 63 F. (2d) 1, 3, affirmed 291 U. S. 245, 54 S. Ct. 416, 78 L. Ed. 777, supra, the court said: 'Cases, and these are supported, we think, by the better reasons, holding that, where the Legislature of a state has declared in specific statutes that deposits of public money must be secured this sufficiently indicates the public policy of the state toward the

securing of public deposits, to sustain contracts whether in exact accordance with the statute or not, made in good faith for their security, are. (Many authorities cited.)'

"Again in Fidelity & Deposit Co. of Maryland v. Kokrda, supra, 66 F. (2d) 641, at page 643, we find the following language: 'While there are decisions to the contrary, the rule supported by many well reasoned decisions is that where the legislature of a state has declared by express statutory enactment that deposits of public funds shall be secured, thereby indicating that the public policy of the state is not only to permit but to require the securing of such deposits, contracts to secure such deposits made in good faith should be sustained, although not entered into in exact accord with the statutory requirements."

To hold that the public funds must have been redeposited after June 25, 1930 would be a rejection of the intent of Congress. For years prior to June 25, 1930, national banks have accepted public moneys on deposit and have given security with the knowledge and consent of the Comptroller of the Currency, under the false idea, it is true, that the banks had power to give such security. Federal courts have held that the power to pledge existed prior to the 1930 amendment and it was not until recently that the Supreme Court decided otherwise. Undoubtedly these facts were known by Congress. Undoubtedly at the time it adopted the 1930 amendment Congress was aware that *then,* all over the nation, public funds were on deposit in na-

tional banks with security given for payment. Undoubtedly, therefore, the amendment was intended to apply to public funds *then* on deposit and to securities *then* held by the depositors, as well as to those to be pledged in the future. No contrary intention is shown or even intimated. No intention or requirement is intimated that the funds then on deposit should be withdrawn and redeposited or that the securities theretofore given should be repledged.

This court further stated in Capital Savings & Loan Association vs. Olympia Nat'l. Bank, supra, quoting from Fidelity & Deposit Co., of Maryland vs. Kokrda (C. C. A. 10) 66 F. (2d) 641, 642, as follows:

> "The plain purpose of the amendment was to remove any doubt of the power of National Banks to give security for public deposits, and in that respect to enable them to invite public deposits on an equal footing on State Banks."

The appellee rests its case upon the law as stated by the Supreme Court in Lewis vs. Fidelity & Deposit Co. of Maryland, supra:

> "When that obstacle" (lack of power to give security) "was removed by the Act of June 25, 1930, the *original* agreement could as to the future be given the effect intended by the parties." (Italics ours.)

There is no doubt concerning the original agreement or the intention of the parties and now that the obstacle has been removed they should both be given effect.

The remainder of this brief will be in answer to the arguments contained in the opening brief of the appellant.

## ANSWER TO APPELLANT'S OPENING BRIEF

Commencing on page 16 of Appellant's opening brief, we agree with appellant that prior to the passage of the amendment national banks were without power to secure deposits of public funds. That point is settled and there is no disagreement. But we disagree with appellant's statement that the amendment did not validate pledges as to deposits made prior to June 25, 1930, unless there is a repledging of the security or a redeposit of the funds. This statement, however, is vague. It is true that the amendment did not validate the prior deposit and pledge of security if, *after* the amendment, we look back at the situation as it stood *prior* to the amendment. For example, if a bank closed prior to June 25, 1930, and was in liquidation on that date, certainly the amendment would not reach back and validate a prior *closed* transaction. But if the bank remained open seventeen months after June 25, 1930, without a withdrawal of the deposit or a surrender of the security with both parties intending that the pledge previously made should be effective *after* the effective date of the amendment, we contend that the original agreement should "as to the future be given the effect intended by the parties."

Commencing on page 18 of his opening brief the appellant departs somewhat from the subject now be-

ing considered and states his disapproval of this court's opinion that the purpose of the amendment was to remove any doubt of the power of national banks to give security for public deposits. Of course, right or wrong, what the Supreme Court says is the law; and the Supreme Court seems to disagree with this court. But regardless of the *purpose* of the amendment, prior to the date of the amendment there was a lot of doubt concerning this power of national banks—so much so, in fact, that most Federal courts recognized such power. And we can positively state that this amendment removed all such doubt. And Congress knew that it was removing this doubt, regardless of its *purpose* in passing the amendment. The principle is the same notwithstanding the purpose of the amendment and Congress undoubtedly had this principle in mind and intended that pledges previously made would "as to the future be given the effect intended by the parties."

Continuing on pages 20 et seq. of appellant's opening brief, we fail to see the difference, so far as the legal effect is concerned, between security given to run for a definite term of four years (as in Lewis vs. Fidelity & Deposit Co., supra) and an executory or continuing pledge for an indefinite time intended to be effective after June 25, 1930. Appellant mentions but fails to point out the difference. He states, further, that the redepositing of the funds after the passage of the amendment (in the Lewis case) "was ob-

viously a new agreement." He overlooks, however, the fact that it is the pledge and not the deposit which he is attacking in this case. It is true that in the Lewis case other funds were later deposited; but there was never any subsequent agreement concerning the security given prior to June 25, 1930, and the Supreme Court held that none was necessary. Without showing the difference appellant states that there is a vast difference between the lien on the bank's assets which arose from giving the bond and the lien of a pledge. We fail to see any legal distinction when both liens were void prior to June 25, 1930, and both liens are valid after that date.

Appellant stresses the failure of the Supreme Court in the Lewis case to decide whether or not the amendment would validate a lien in respect to deposits made before June 25, 1930. The question was not before the court and the court so stated, and added:

> "Compare Gross v. United States Mortgage Co., 108 U. S. 477, 488, 2 S. Ct. 940, 27 L. Ed. 795; West Side Belt R. Co. v. Pittsburg Construction Co., 219 U. S. 92, 31 S. Ct. 196, 55 L. Ed. 107; Charlotte Harbor & Northern R. Co. v. Welles, 260 U. S. 8, 43 S. Ct. 3, 67 L. Ed. 100."

If these cases which the Supreme Court invites us to compare are indicative of the Supreme Court's opinion, certainly appellee's contentions should be upheld in every respect. Gross vs. United States Mortgage Co., involved the validity of a mortgage which was made at the time when the mortgage was invalid

under the existing local law, but which was subsequently validated. As to the validating act the Supreme Court said:

> "That the Act in question is not repugnant to the Constitution, as impairing the obligation of a contract is, in view of the settled doctrines of this court, entirely clear. Its original invalidity was placed by the court below upon the ground that the statutes and public policy of Illinois forbade a foreign corporation from taking a mortgage upon real property in that State to secure a loan of money. Whether that inhibition should be withdrawn was, so far at least as the immediate parties to the contract were concerned, a question of policy rather than of constitutional power. When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the State, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt. We repeat here what was said in Satterlee v. Matthewson, 2 Pet., 412, and, in substance in Watson v. Mercer, 8 Pet., 110, that 'It is not easy to perceive how a law, which gives validity to a

void contract, can be said to impair the obligation of that contract.' "

In West Side Belt R. Co. vs. Pittsburg Construction Co., the Supreme Court held that an act legalizing contracts of foreign corporations applied to contracts theretofore invalid, and stated:

"In Watson v. Mercer, 8 Pet. 88, 8 L. Ed. 876, such an act was sustained against a charge that it devested vested rights and impaired the obligation of a contract. The act considered made valid the deeds of married women which were invalid by reason of defective acknowledgments, and avoided a judgment in ejectment rendered against one of the parties to the action because of such a defect in a deed relied on for title. The controversy was between the successor by descent of the married woman and the grantee in the deed. It was said in the argument that the descents had been confirmed by two judgments of the supreme court of the state against the deed, adjudicating it to be void on points involving its validity, which judgments, it was contended, were conclusive evidence that the deed was no deed, and that the rights acquired by descent were absolute vested rights. The act was nevertheless sustained, as we have stated.

"Satterlee v. Matthewson, 2 Pet. 380, 7 L. Ed. 458, is to the same effect. Title was set up as a defense in an action of ejectment to which the plaintiff replied that, conceding it to be the older and better than his, nevertheless could not be set up against him, as the defendant was his tenant.

> The trial court took that view, and the supreme court of the state reversed it on the ground that, by the statute law of the state, the relation of landlord and tenant could not subsist under a Connecticut title. Before the second trial of the case the legislature of the State (Pennsylvania) passed a law providing that the relation of landlord and tenant should exist under such titles. This court affirmed the judgment of the supreme court of the state, sustaining the law."

And in Charlotte Harbor & Northern R. Co. vs. Welles, the Supreme Court held that a state legislature may validate assessments previously made for the construction of roads and bridges, and stated:

> "In a petition for rehearing, plaintiff in error attacked the reasoning and conclusion of the court, and asserted against them the inhibition of the 14th Amendment of the Constitution of the United States, which precludes a state from the taking of property without due process of law. The specification of the grounds is that 'the said bill (to quote from it) attempts to legalize a proceeding of the county commissioners of De Soto county, Florida, who were mere administrative officers, and which proceeding was void *ab initio* and without jurisdiction, and under which proceeding certain taxes were levied against the property of your petitioner, prior to the passage of said act of the legislature, and therefore the said act of the legislature, in so far as it purports to create a liability on your orator for taxes previously assessed against your orator under a proceeding

of said administrative officers, is void *ab initio* and without jurisdiction.' The court considered the petition for rehearing and denied it.

"In support of the contention of the petition, plaintiff in error makes a distinction between a curative statute, which it is conceded a legislature has the power to pass, and a creative statute, which, it is the assertion, a legislature has not the power to pass. The argument in support of the distinction is ingenious and attractive, but we are not disposed to review it in detail.

"The general and established proposition is that what the legislature could have authorized it can ratify, if it can authorize at the time of ratification. United States v. Heinszen, 206 U. S. 370, 51 L. Ed. 1098, 27 Sup. Ct. Rep. 742, 11 Ann. Cas. 688; Phillip Wagner v. Leser, 239 U. S. 207, 60 L. Ed. 230, 36 Sup. Ct. Rep. 66; Stockdale v. Atlantic Ins. Co., 20 Wall. 323, 22 L. Ed. 348. And the power is necessary that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration."

From pages 22 to 30 of his brief appellant endeavors to give a retroactive effect to the Act of June 25, 1930, as applied to this case and thus departs from the true proposition involved. As we have heretofore stated, the appellee does not contend that the Act will reach back and validate the situation as it existed prior to June 25, 1930. For example if a court were to consider the rights of the parties as they existed, for instance, on June 1, 1929, prior to the amendment, the

court would naturally hold the pledge to have been void *on that date;* and if the court should hold that the pledge was valid as of June 1, 1929, because of the later amendment, the court would then be giving the amendment a retroactive effect. On the contrary a retroactive operation would not be given the amendment by holding that the previously given pledge was valid *after* the amendment was adopted when the parties so intended, for the reason that, after the adoption of the amendment the parties had the legal right to so intend; and in so holding the court would not be applying the amendment to facts as they existed prior to the adoption of the amendment. Appellant's argument wholly ignores the law as stated by the Supreme Court (Lewis vs. Fidelity & Deposit Co. of Maryland, supra) "when that obstacle was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties. . . . A statute is not retroactive merely because it draws upon antecedent facts for its operation."

The quotation from 25 R. C. L. 785 and 786 on pages 23 to 25 of appellant's opening brief is not applicable for the reason that a retrospective operation of the statute is not sought by the appellee inasmuch as giving effect to the intention of the parties existing after the amendment was adopted does not constitute a retroactive operation.

The statute does not create any new rights or take away any vested rights. In 25 R. C. L., page 789, Sec. 36, it is stated:

"The better rule of construction, and the rule peculiarly applicable to remedial statutes, however, is that a statute must be so construed as to make it effect the evident purpose for which it was enacted; and if the reason of the statute extends to past transactions as well as to those in the future, then it will be so applied, although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty."

And in the same volume of R. C. L. on page 791, Sec. 38, the text states:

"But the rule (against retrospective operation) does not prevent the application of statutes to proceedings pending at the time of their enactment where they neither create new, nor take away any vested, rights."

Harvey vs. Tyler, 2 Wallace 328, 17 L. Ed. 871, cited by appellant, is not in point, it being merely therein decided that an agreement to pay compensation for procuring a contract to furnish supplies to the government is against public policy and unenforceable. And we fail to find the sentence quoted on page 26 of appellant's opening brief.

In United States vs. Union Pac. Ry., 98 U. S. 569, 25 L. Ed. 143, cited by appellant, the Supreme Court held that the statute there considered was not intended to change substantial rights and was intended to provide only a procedure which would give a larger scope for the action of the court. The case is not in point.

In U. S. Fidelity & Guaranty Co. vs. United States, 209 U. S. 306, 52 L. Ed. 804, cited by appellant, the Supreme Court refused to retroactively apply a procedural statute to a cause of action which existed prior to the passage of the act. In the case at bar no cause of action existed prior to the amendment of June 25, 1930.

In City Railroad vs. Citizens' Street Railway Co., 166 U. S. 557, 41 L. Ed. 1114, cited by appellant, the Supreme Court refused to give retrospective effect to a statute when such retroactive operation would have destroyed a vested contract right to operate a street railroad. Neither the facts nor the law involved are comparable to those involved in the case at bar.

In Schwab vs. Doyle, 258 U. S. 528, 66 L. Ed. 747, cited by appellant, the Supreme Court refused to give retroactive effect to the Estate Tax Act of 1916; clearly not in point. A statute imposing a tax is construed strictly in favor of the taxpayer.

In the argument on pages 27 and 28 of his opening brief appellant contends that either the pledge or the deposit must have been made after June 25, 1930. Contrary to appellant's suggestion the Supreme Court does not even intimate such a requirement. The Supreme Court states in the Lewis case that the intention of the parties after that date is given effect by the amendment. The intention of the parties in the case at bar that the pledge should be effective after June 25, 1930, is undisputed.

The Supreme Court has held on several occasions that a statute is not retroactive merely because it relates to antecedent facts or draws upon antecedent facts for its operation.

Lewis v. Fidelity & Deposit Co. of Maryland, supra;

Reynolds v. United States, 54 S. Ct. 800, 292 U. S. 443, 78 L. Ed. 1353.

In Cox v. Hart, 260 U. S. 427, 435, 43 S. Ct. 154, 67 L. Ed. 332, the court again stated the above rule and held that an act which gives an entryman on desert land certain rights applies to those who complied with the requirements of the act prior to the date the act became effective.

In Ewell v. Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. Ed. 682, the Supreme Court held that the repeal of a usury law cuts off the defense of usury even in actions upon contracts made prior to the repealing act. The court states:

> "The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon

contracts previously made. And such laws, operating with that effect, have been upheld as against all objections, on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. The very point was so decided in the following cases. Curtis v. Leavitt, 15 N. Y., 9; Bank v. Allen, 28 Conn., 97; Welch v. Wadsworth, 30 Conn., 149; Andrews v. Russell, 7 Blackf., 474; Wood v. Kennedy, 19 Ind., 68; Danville v. Pace, 25 Grat., 1; Parmelee v. Lawrence, 48 Ill., 331; Woodruff v. Scruggs, 27 Ark., 26.

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the Act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that, whatever the statute gives, under such circumstances, as long as it remains *in fieri,* and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which contrary to law he actually made is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read v. Plattsmouth, decided at the present Term (ante, 414). And see Lewis

> v. McElvain, 16 Ohio, 347; Johnson v. Bently, Id., 97; Trustees v. McCaughy, 2 Ohio St., 155; Satterlee v. Matthewson, 16 S. & R., 169; 2 Pet., 380; Watson v. Mercer, 8 Pet., 88."

In United States v. Trans-Missouri Freight Association, 166 U. S. 290, ..... S. Ct. ....., 41 L. Ed. 1007, it was held that retroactive effect is not given to a statute making combinations in restraint of trade illegal, by applying the statute to a continuation, after its passage, of a preexisting contract.

We repeat a portion of the quotation from Gross v. United States Mortgage Co., supra:

> "When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the State, upon the execution of a contract like this, it cannot be held that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make."

In Rosenplanter v. Provident Sav. Life Assur. Society of N. Y. (C. C. A. 10) 96 Fed. 721, wherein the effect of repealing an act relating to forfeitures was being considered, the court stated:

> "The repeal simply permits the contract into which the parties had entered to be enforced according to its own terms and conditions. 'The laws with reference to which the parties must be assumed to have contracted . . . were those which, in their direct or necessary legal operation, controlled or affected the obligations of such con-

> tract.' Insurance Co. v. Cushman, 108 U. S. 51, 65, 2 Sup. Ct., 236. Laws repealing laws which prevent the operation of contracts otherwise within the competency of the parties, and permit their enforcement according to their terms, have never been regarded as laws impairing the obligation of contracts, or as an impairment of vested rights." (Many cases cited.)

In Petterson et al. v. Berry, (C. C. A., 9) 125 Fed. 902, this court held that the repeal of a usury statute takes away the debtor's privilege of avoiding a usurious contract, even though the contract may have been made prior to the repealing act.

The Act of May 24, 1934, relating to naturalization applies to an alien whose husband or wife was naturalized "after the passage of this Act, as here amended." Nevertheless, in United States v. Bradley, (C. C. A., 7) 83 F. (2d) 483, the court held that an alien whose wife was naturalized prior to the amendment was entitled to naturalization under the amendment. The court states:

> "Appellant contends that appellee's construction of the amendment would render the act retroactive. We think not. Authority is abundant to support the proposition that an act is not retroactive merely because it involves facts which antedate the passage of the act."

Relative to a lease contract, the court states in Hartford Fire Insurance Co. et al. v. Chicago, M. & St. P. Ry. Co., (Circuit Ct., N. D. Iowa) 62 Fed. 904:

"The rule applicable to cases of the character of that now before the court, wherein a party seeks to evade the obligation of a contract to which he is a party, on the ground of public policy, is that the court will not lend its aid to enforce the contract if, at the time its aid is sought, the contract is contrary to the then existing public policy. The court, in such case, refuses its aid for the enforcement of the contract, not because such is the right of either of the contracting parties, but because the public interests are adverse to the enforcement of the contract. If, however, at the time when the aid of the court is sought to enforce the terms of an existing contract, the public interests do not demand that the court should refuse to aid in enforcing the contract according to its terms, the court would not be justified in refusing its aid simply because *at some previous time,* under the then existing laws, and as circumstances then were, such aid would have been refused if then demanded." (Italics ours.)

In re Dearborn's Estate (Okla.), 2 P. (2d) 93, the court held that where parties in good faith comply with marriage forms, the law will treat their continued relation as husband and wife after removal of a previous disability, as a valid marriage.

On page 28 of his brief appellant states that "the application of the statute to deposits that were made prior to June 25, 1930, under a continuing pledge agreement and bond that were likewise made prior to June 25, 1930, would give the statute a retroactive

operation; whereas, the application of the statute to deposits that were made subsequent to June 25, 1930, the collateral in pursuance of the pledge having been delivered prior to the operative date of the amendment, would not give the statute a retroactive operation . . ." Appellant overlooks the fact that in this case he is attacking the pledge and not the deposit. It is apparent that the law as stated by the Supreme Court (Lewis v. Fidelity & Deposit Co., of Maryland, supra) forces him to the position he assumes, to-wit, that a previously made pledge is vitalized by the amendment. Inasmuch as he is attacking the pledge and not the deposit, the shots that he thus fires at the deposit are therefore without logic or reason. His quotation on the following page (29) from Columbus Spar v. Starr, 214 N. Y. Supp., 652, states Appellee's position exactly:

> "A statute does not operate retrospectively when it is made to apply to *future transactions,* merely because those transactions have relation to and are *founded upon antecedent events.*" (Italics ours.)

In the case at bar the "future transactions" are made up of the intention of the parties that the continuing pledge should remain effective after June 25, 1930, and the fact that the bonds actually remained on pledge for seventeen months after that date.

In most of the cases cited on pages 31 to 39 of appellant's opening brief the contracts were consummated prior to the enactment of the enabling act, or

there was no enabling act and the parties themselves endeavored to ratify a void contract; situations wholly different from that now confronting the court. Appellant is entirely correct in his quotation from McDougald v. New York Life, (C. C. A., 9) 146 Fed. 678, but we fail to see its application to this case. Inasmuch as there was no later enabling act the same can be said of California Natl. Bank v. Kennedy, 167 U. S. 362, 17 S. Ct. 831, 42 L. Ed. 198.

We do not disagree with appellant's contentions on pages 40 to 49 of his opening brief. The receiver may recover illegally pledged assets without making restitution to the pledgee, the stockholders are not bound by unlawful acts of the receiver, and dividends should be paid to unsecured creditors in proportion to the amounts of their respective claims. But they do not apply to this case. Appellee stands squarely on the proposition that the pledge was valid after June 25, 1930. Appellant implies, without a direct statement, that the amendment was adopted and the pledge was made for the benefit of the County. We quote further from Capital Savings & Loan Ass'n. v. Olympia Nat. Bank, supra:

> "Whatever may be the purpose of the state statutes, which we will consider hereafter, it is clear that the federal statute just quoted was enacted for the protection not of state officers but of national banks and their depositors."

On pages 50 to 57 of his opening brief appellant quotes from Wood v. Imperial Irrigation District,

(Cal.) 17 Pac. (2d) 128, wherein it was held that an irrigation district is not a political subdivision or a municipal corporation, hence the funds of such district are not public funds; further, that the constitution of California does not permit banks to secure deposits of irrigation districts. The court states:

> "We are of the view that the language of the constitutional provisions does not permit the inclusion of an irrigation district as one of the entities which may be empowered to draw from the assets of a bank its securities as a protection against loss for the benefit of one class of depositors to the prejudice of another."

The court held further that the securing of such deposits is contrary to public policy. Such is not the case with public funds deposited in Arizona. Further, the court held that the late act which authorized such deposits was not complied with. The court directly opposes the decisions in federal cases upon the subject when it states that "no act could have been done by the parties to the transaction which would have retroactively converted the common character of said deposits into secured or deferred deposits. . . . A contract void because it stipulates for doing what the law prohibits is incapable of being ratified." Here the court erroneously uses the word "retroactively" which in connection with such matters means the application of the act to the situation and rights of the parties *prior* to the passage of the act. Of course nothing could have been done by the parties which

would have validated the pledge on a day *prior* to the adoption of the act.

Thompson, Receiver, v. Twin Falls Highway District (not reported) set forth in the appendix to appellant's opening brief is decided upon the authority of Wood v. Imperial Irrigation District, supra, and in disposing of the question Judge Cavanaugh adopts the very language of the California court. Both cases wholly ignore the words of the Supreme Court: "A statute is not retroactive merely because it draws upon antecedent facts for its operation"; When the "obstacle was removed . . . the original agreement could as to the future be given the effect intended by the parties." The decision of Thompson, Receiver, v. Twin Falls Highway District is not supported by any other federal cases and is contrary to the rule announced in every federal court including the Supreme Court of the United States.

On page 58 of his opening brief appellant complains of the action of the trial court in defining the conditions under which the pledge was made. The Transcript of Record (page 74) shows that the funds deposited were public moneys of the County and the Arizona statute of course fixes the conditions of the pledge. The facts evidence a pledge even though the bonds were actually held by an escrow agent. Fidelity & Deposit Co. of Maryland v. Kokrda, supra.

We are prompted to pass as unimportant the argument on page 59 of appellant's brief. The pledge being valid, of course the moneys received by the Coun-

ty from the pledged securities constitute "payments" to appellee. If the pledge was invalid notwithstanding the Act of June 25, 1930, the "payments" received from payment or sale of the pledged bonds must be returned to the Receiver.

## CONCLUSION

Excepting only the U. S. District Court for the Southern Division of Idaho, every federal court which has approached the question sustains the validity of the pledge during the seventeen months between June 25, 1930 and the date the bank closed. We contend that the "obstacle was removed by the Act of June 25, 1930" and that the original agreement should now "be given the effect intended by the parties." And we therefore respectfully submit that the decree of the trial court should be affirmed.

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